Filed 5/17/07 Marriage of Tinker CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IN re Marriage of KRISTIN and MARK TINKER. _____ _ KRISTIN TINKER, Appellant, v. MARK TINKER, Respondent.	B187632 (Los Angeles County Super. Ct. No. BD284951)

APPEAL from an order of the Superior Court of Los Angeles County, Reva G. Goetz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Freid and Goldsman, Gary J. Cohen for Appellant.

Buter, Buzard, Dunaetz & Fishbein, Nancy L. Dunaetz for Respondent.

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I. INTRODUCTION

Kristen Tinker, appeals from a post-judgment order[1] in favor of her former spouse, Mark Tinker: reducing the amount of spousal support paid to her from $25,000 to $20,000 per month; setting a cut-off date for spousal support of December 31, 2007; and thereafter retaining jurisdiction to reinstate spousal support. We conclude the trial court did not abuse its discretion in: finding changed circumstances were present that warranted reconsidering the level of spousal support Mark[2] must pay; reducing the spousal support amount with a December 31, 2007 cutoff date; and denying Kristin's new trial motion. We therefore affirm the orders under review.

II. PROCEDURAL BACKGROUND

The parties were married on April 18, 1988, and separated on August 20, 1998. The stipulated judgment of dissolution was entered on May 26, 2000. Under the terms of the stipulated judgment, Mark was ordered to pay Kristin $28,0000 per month until: the death of either party; Kristin's remarriage; or further court order. The May 26, 2000 judgment contains the following warning: "Pursuant to the authority of California Family Code, Sections 4320 and 4330, and Marriage of Gavron, 203 Cal.App.3d 705,

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1 The bench officer whose rulings are being challenged is Commissioner Reva G. Goetz. In 2003 through 2004, Judge Roy Paul made rulings in response to an order to show cause brought by Mark. Judge Paul's rulings are pertinent to Commissioner Goetz's orders which are the subject of this appeal. Since her rulings are directly at issue and for purposes of clarity, we will refer to Commissioner Goetz as the trial court and Judge Paul by his title and name.

2 For purposes of clarity and not out of any disrespect, we will refer to the parties by their first names.

250 Cal.Rptr. 148 (1988), [Kristin] is hereby warned that it is the policy of the State of California that when a marriage comes to an end, both parties to that former marriage shall make reasonable efforts to contribute to their own support needs. [Kristin] is warned that she is required to make such reasonable efforts for her support needs within a reasonable period of time, which has generally been defined as one-half the length of the marriage. [Kristin] is warned that her failure to make such reasonable efforts may be one of the factors a Court may consider as a basis for modifying or terminating support." On August 2, 2000, Kristin acknowledged receipt of the judgment which contained the foregoing warning.

On October 30, 2003, Mark filed an order to show cause to modify spousal support. During the proceedings which were held before Judge Paul, issues were raised concerning Kristin's inability to make a profit from her art related business. Mark was employed as producer of a long running television program. During the February 24, 2004 order to show cause hearing, Judge Paul stated: "So we've got six years on a ten year, four month marriage. In regards to marketable skills, therein lies again the [kettle of] fish. We don't know if she's unable to make it in art, which the argument is that's the only thing she can make. If she continues to show losses and cannot, in fact, make it in art, then there has to be some significant effort to, in fact, retrain. Regardless if she starts out at whatever level. And figure out what she's going to do regardless of the age. So your client may at some point be facing a sudden drastic change in her income level. [¶] And at this point, if that were to happen -- it's not going to happen at this hearing -- if it happens at some point . . . that's one of the concerns the court's looking at. And why Gavron does, in fact, this court believes, switch the burden to your client to establish what her reasonable efforts to, in fact, become self-supporting are." Additionally, Kristin's counsel acknowledged: "[I]f he loses his job, my client's support is going to be dramatically reduced. We all know that's a fact." At a March 5, 2004 attorney fee hearing, Judge Paul twice adverted to the *Gavron* decision, stating at one point: "But

with a Gavron warning built in, I think it has to have some message and impact. I think at this point there's been a lot of money spent on both sides to get these points across."

On April 6, 2004, an order and findings were entered on Mark's order to show cause which reduced spousal support to $25,000 per month subject to further court order, Kristin's remarriage, or the death of either party. Judge Paul found that: Mark had been paying spousal support for six years; Kristin had not made a reasonable effort to become self-sufficient since the separation; and it was "unacceptable" for Kristin's business pursuits to continue to sustain losses. Mark appealed Judge Paul's April 6, 2004 order. The principal issue raised on appeal was that Judge Paul did not know he had discretion to further reduce the level of spousal support payable to Kristin. On May 5, 2005, we affirmed Judge Paul's April 6, 2004 order. (*In re Marriage of Tinker* (May 5, 2005, B175881) [nonpub. opn.].)

On June 10, 2005, Mark filed an order to show cause which sought to decrease the amount of spousal support to "no more than" $9,000 per month. In her responsive papers, Kristin acknowledged that Mark was seeking to reduce the level of spousal support to no more than $9,000 per month. The asserted new circumstances were that: Mark was a television producer who produced a particular program; the program had been cancelled; and his salary had been reduced from $158,369 to $60,659 per month. In its written order filed September 30, 2005, the trial court found that: changed circumstances were present; the standard of living when the parties separated in 1998 was no longer the proper measure of support; and Kristin had not taken the warning that she become self-supporting seriously. Support was reduced to $20,000 per month effective September 1, 2005. Effective January 1, 2008, support was reduced to zero although the trial court retained jurisdiction thereafter. Kristin appeals from the September 30, 2005 order.

III. DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion In Finding Changed Circumstances

Kristin argues that Mark's circumstances had not "changed enough" to permit a modification of the support order. In order to modify a spousal support order, there must be a material change of circumstances since the prior order. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575*; In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899.) The changed circumstances include a reduction in the supporting spouse's ability to pay support. (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982; *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1173; see *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454 ['"circumstances,' 'includes "practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties."'"].) The supporting spouses property and ability to earn are factors that must be considered. (*Id*. at p. 455; *In re Marriage of Lieb* (1978) 80 Cal.App.3d 629, 637, fn. 4.) The relevant material changed circumstances must have occurred since the most recent order and they must exist at the time of the hearing on the modification order to show cause. (*In re Marriage of Tydlaska, supra,* 114 Cal.App.4th at pp. 575-576; *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412.) A trial court has broad discretion to change a support order. (*In re Marriage of Tydlaska, supra*, 114 Cal.App.4th at p. 575; *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928.) Changed circumstances findings are reviewed for an abuse of discretion. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47; *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 478.)

No abuse of discretion occurred. On April 6, 2004, Mark was ordered to pay $25,000 per month in support to Kristin. At the time of Judge Paul's April 6, 2004 order, Mark was earning $158,368 per month. After the April 6, 2004 order was entered, Mark

lost his longtime employment as a television producer because the program was cancelled. When the June 10, 2005 order to show cause was issued, Mark's monthly income had been reduced to from $158,368 to $60,659 per month. Needless to note, without abusing its discretion, the trial court could find this dramatic reduction in Mark's monthly income constituted changed circumstances in that his ability to pay support had been reduced.

Kristin argues that the trial court did not take into account Mark's substantial liquid assets and two residences. There is no evidence the trial court failed to consider these factors. In fact, in its extraordinarily lengthy written order, the trial court explicitly refers to those assets and all of the Family Code[3] section 4320 factors. The trial court

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[3] Family Code section 4320 states: "In ordering spousal support under this part, the court shall consider all of the following circumstances: [¶] (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. [¶] (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party. [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living. (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the separate property, of each party. [¶] (f) The duration of the marriage. [¶] (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party. [¶] (h) The age and health of the parties. [¶] (i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party. [¶] (j) The immediate and specific

also adverted to Kristin's assets including: $1,000 per month in Mark's residuals; liquid assets in the amount of $266,552; her $400,000 equity in her residence; and additional assets in the form of art works, furnishings, china, silver and jewelry worth $267,335. The trial court considered all of the relevant factors in concluding that Mark's ability to pay support had been materially reduced. Because of the dramatic reduction in Mark's monthly income, we need not address whether the changed circumstances finding could be premised on Kristin's failure to become self-sufficient within a reasonable period of time. (See *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1231.)

Kristin argues that even if there were changed circumstances based on Mark's salary, such did not permit modifications of the level or duration of support. Kristin relies on the following language in the case of *In re Marriage of Schaffer* (1984) 158 Cal.App.3d 930, 934, "The tasks of the court at a postjudgment modification hearing are to discern the change, if any, of the circumstances established at the trial and to formulate an order based upon those changes." (Fn. omitted.) Additionally, Kristin relies on the following language in the case of *In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 700-701: "In the instant case, there is no demonstrated nexus between husband's inability to discharge the second trust deed indebtedness and either the cash flow or expenses of either party. While the court may consider the property each party owns and their respective obligations as a factor (Civ. Code, § 4801, subdivision (a)(3); *In re Marriage of Morrison*[, *supra*,] 20 Cal.3d [at pages] 454-455), it is the 'economic relation' which must be the changed circumstance. (*In re Marriage of Clements* [(1982)]

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tax consequences to each party. [¶] (k) The balance of the hardships to each party. [¶] (l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties. [¶] (m) The criminal conviction of an abusive spouse shall be considered in making a reduction

134 Cal.App.3d [737] 745-746.) Here there was no attempt to describe the impact to either party's economic situation: injury to wife, nor benefit to husband. The mere fact of the discharge of the indebtedness standing alone was an insufficient factor to constitute a change of circumstance."

This contention has no merit. A trial court has the discretion, depending on the circumstances, to rule that a material reduction in the ability to pay support warrants modification of a prior order. (*In re Marriage of McCann*, *supra*, 41 Cal.App.4th at p. 982; *In re Marriage of Hoffmeister*, *supra*, 161 Cal.App.3d at p. 1173.) As noted, there is substantial evidence of a material change in Mark's circumstances—he lost his primary source of income. Upon finding changed circumstances, the trial court was required to fashion a proper support order and that requires a consideration of the Family Code section 4320 circumstances; all of them. Family Code section 4320 begins, "In ordering spousal support under this part, the court shall consider *all* of the following circumstances. . . ." (Italics added; see fn. 2, *infra*.) Among those factors are: the supporting party's ability to pay spousal support, taking into account earning capacity, earned and unearned income, assets, and standard of living; each parties' needs as established during the marriage; the obligations and assets, including the separate property, of each party; whether the supported spouse has made reasonable efforts at becoming self-supporting; as well as other just and equitable factors. (Fam. Code, § 4320, subds. (c)-(e), (l), (n); see *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 479-482.) Thus, once the trial court found a change in circumstances, it was required to consider all of the Family Code section 4320 circumstances which is what it did.

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or elimination of a spousal support award in accordance with Section 4325. [¶] (n) Any other factors the court determines are just and equitable."

B. The Trial Court Did Not Abuse Its Discretion In Reducing Kristin's Support And Imposing A Cutoff Date With The Retention Of Jurisdiction.

Kristin argues the trial court abused its discretion on August 11, 2005, in reducing her support from $25,000 to $20,000 per month effective September 1, 2005 with a termination date of December 31, 2007. Family Code section 4330, subdivision (b) provides, "When making an order for spousal support, the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court pursuant to Section 4320, unless, in the case of a marriage of long duration as provided for in Section 4336, the court decides this warning is inadvisable." Further, Family Code section 4320, subdivision (l) provides: "(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties." Family Code section 4336, subdivisions (b) and (c) describes the scope of judicial discretion in terminating support when the marriage is of long duration: "For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. . . . [¶] (c) Nothing in this section limits the court's discretion to terminate spousal support in later proceedings on a showing of changed circumstances."

As noted, the goal of spousal support is for the supported spouse to become self-sufficient within a reasonable period of time. (Fam. Code, § 4320, subd. (l); *In re Marriage of Shaughnessy*, *supra*, 139 Cal.App.4th at p. 1238.) As our colleague, Associate Justice Earl Johnson has explained, "As recognized by our Supreme Court the

public policy of this state has progressed from one which 'entitled some women to lifelong alimony as a condition of the marital contract of support to one that entitles either spouse to postdissolution support for only so long as is necessary to become self-supporting.'" (*In re Marriage of Schmir, supra,* 134 Cal.App.4th at p. 54 citing *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 53; fn. omitted.) The Supreme Court has explained, "The law has thus progressed from a rule that entitled some women to lifelong alimony as a condition of the marital contract of support to one that entitles either spouse to postdissolution support for only so long as necessary to become self-supporting." (*Ibid.*)

The discretion available to a judge in reducing or terminating support where the supported spouse has failed to secure employment and become self-sufficient within a reasonable period of time was described by our colleague, Associate Justice Cynthia G. Aaron of Division One of the Fourth Appellate District: "A trial court acts within its discretion in denying spousal support where the supported spouse has failed to diligently seek employment sufficient to become self-supporting. (*In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742, 749 [trial court acted within its discretion in refusing to continue spousal support after five years following a 13-year marriage, where supported spouse 'had done little to prepare herself for or to seek gainful employment']; *In re Marriage of Rosan* (1972) 24 Cal.App.3d 885, 896 ['When evidence exists that the party to be supported has unreasonably delayed or refused to seek employment consistent with her or his ability . . . that factor may be taken into consideration by the trial court in fixing the amount of support in the first instance or in modification proceedings'].) "Whether there has been such unreasonable delay is a question addressed peculiarly to the trial court which heard the party's testimony and observed the party's demeanor at trial." (*In re Marriage of Sheridan, supra,* 140 Cal.App.3d at p. 749.) There is no requirement that the failure to exercise diligence in seeking gainful employment has been in bad faith. (*Ibid.*)" (*In re Marriage of Shaughnessy, supra,* 139 Cal.App.4th at p. 1238.) Spousal support may not be terminated because a supported spouse has failed to

take steps to achieve self sufficiency without notice. (*In re Marriage of Schmir, supra,* 134 Cal.App.4th at p. 55; *In re Marriage of Gavron*, *supra*, 203 Cal.App.3d at p. 712.) Thus, the advisement of the need to become economically self sufficient is commonly called a "'*Gavron* warning.'" (*In re Marriage of Schmir*, *supra*, 134 Cal.App.4th at p. 55; see Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2006) ¶17.168.1, pp. 14-41.)

Here, the parties were married on April 18, 1988, and they separated on August 20, 1998—thus the marriage lasted 10 years, 4 months. In the stipulated May 26, 2000 judgment, Kristin was advised that she was required to make "reasonable efforts" to provide for her support within a "reasonable period of time" which generally is defined as one-half the duration of the marriage. At the time of the May 26, 2000 judgment, Kristin was earning $2,250 per month. She later stipulated her earning capacity was $2,500 per month. However, since 2001, Kristin who operates an "art business" has continued to sustain substantial financial losses. In 2001, Kristin suffered a net loss of $23,054. From July 1, 2004 through June 30, 2005, the losses had increased to $30,477. Kristin was further advised at the time of the hearings before Judge Paul on the October 30, 2003 order to show cause and in the ensuing order that: she was not making reasonable efforts to be self-sufficient; it was "unacceptable" for her to continue the financial losses she was experiencing in her art business; and the so-called *Gavron* warning in the judgment "has to have some message and impact." Mark had been paying support to Kristin since November 18, 1998.

Under these circumstances, no abuse of discretion occurred when the amount of support was reduced on August 11, 2005, to $20,000 per month and with a further reduction to zero effective December 31, 2007, accompanied by a retention of jurisdiction. The trial court found that Kristin had not made reasonable efforts to become self-supporting; a conclusion supported by substantial evidence. Kristin's art business had been operating at a loss for years. Substantial evidence supports the trial court's exercise of discretion particularly in light of the absence of any evidence Kristin secured

an income producing job between the dates of separation, August 20, 1998, and the order under review entered on August 11, 2005. The trial court could reasonably find Kristin's conduct violates Family Code section 4320, subdivision (l) and the express public policy described by our Supreme Court in the case of *In re Marriage of Pendleton & Fireman*, *supra*, 24 Cal.4th at page 53 that provides support may be paid only so long as necessary for the supported spouse to become self-supporting.

There is no merit to Kristin's contention that she was not adequately warned she must become self-supporting. As noted, the May 26, 2000 judgment explicitly warned Kristin that she must become self-supporting. Further, Judge Paul repeatedly referred to the *Gavron* issue during the February 24 and March 5, 2004 hearings on the October 23, 2003 order to show cause.

Nor is there any merit to Kristin's argument the trial court abused its discretion because there was no evidence she could become self-supporting by December 31, 2007. Kristin relies on the decision of *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 656-658. *Prietsch & Calhoun* involve a step-down order based on speculation that the spouse could earn more money living in the San Francisco area than in Sweden. (*Id*. at pp. 656-659; see Hogoboom & King, Cal. Practice Guide: Family Law (Rev. #1 2007) § 6:841, p. 6-302.13.) No such speculation is present here. Kristin was given over nine years to become self-supporting and she failed to do so. In fact, her "art business" continued to show increased losses. *Prietsch & Calhoun*, a case with speculation and no findings, is in sharp contrast to the present case with its lengthy findings and clear evidence Kristin's failure to secure a job where she earned an income over nearly a decade. It bears emphasis, the marital standard of living consideration is but one of the Family Code section 4320 factors. (See *In re Marriage of Shaughnessy*, *supra*, 139 Cal.App.4th at p. 1248; *In re Marriage of Rising, supra,* 76 Cal.App.4th at p. 479, fn. 9.)

Finally, there is no merit to Kristin's reliance on *In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1201-1204. In *Heistermann*, the Court of Appeal

explained the trial court's ruling in a case where the supported spouse was disabled thusly, "[T]he focus of the trial court's decision, as reflected in its written statement, was not that Marilyn would no longer need support nor that the equities had shifted based on changed circumstances, but was its erroneous perception that the mere passage of time required it to shift the support obligation from the ex-spouse to society and to terminate its jurisdiction over spousal support." (*Id*. at p. 1204.) Further, there was no warning to the supported spouse that she was expected to become self-supporting. (*Ibid*.) The Court of Appeal reversed the support termination order. (*Ibid*.) As is readily apparent, *Heistermann* is readily distinguishable from the present case: the supported spouse is not disabled; the supported spouse was warned she was expected to become self-supporting; the supported spouse refused to become self-supporting; there was no assumption by the trial court that the mere passage of time required that the disabled supported spouse no longer receive moneys from her former husband; and there was no termination of jurisdiction. No abuse of discretion occurred.

C. No Due Process Violation Occurred

Kristin argues that her new trial motion should have been granted. After the trial court issued its August 11, 2005 order which reduced the amount of spousal support, Kristin filed a new trial motion. The new trial motion stated, "[Plaintiff] was not afforded notice of the possibility that her spousal support could be terminated and because [Kristin] was not given an opportunity to be heard on the matter of the termination of spousal support." Kristin contends she had no notice the trial court would shorten the duration of and ultimately terminate support because: the box on the order to show cause that states, "Terminate existing order" was not checked; instead the box that was checked on the order to show cause form was "Modify existing order"; and Mark's reply papers repudiated any intention to seek termination of support.

We review an order denying a new trial motion for an abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859; *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452.) No abuse of discretion occurred. The order to show cause expressly indicated Mark was seeking to modify the spousal support order to no more than $9,000 monthly. That notice indicates Mark was seeking a monthly spousal award from between zero to $9,000. Moreover, throughout the litigation, Kristin had been placed on notice that she had a responsibility to become self-supporting. The May 26, 2000 judgment contains an express warning that if Kristin did not become self-supporting, spousal support could be terminated. On March 5, 2004, at the hearing on Mark's order to show cause before Judge Paul, Kristin was once again warned that the failure to become self-supporting would invariably have consequences. Kristin was put on notice that if the trial court found changed circumstances, after consideration of the Family Code section 4320 factors, the spousal support order could be reduced anywhere from zero to only $9,000 per month. The trial court refused to reduce the monthly spousal abuse award to zero or $9,000 per month. Rather, the trial court reduced the award to $20,000 per month until December 31, 2007; with a retention of jurisdiction thereafter.

IV. DISPOSITION

The orders under review are affirmed. Mark Tinker is to recover his costs incurred on appeal from Kristin Tinker.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring in part and dissenting in part

I respectfully dissent from the court's decision affirming the trial court's order reducing Mark Tinker's (Mark)[1] support obligation to zero as of January 1, 2008 (the "step-down" order). Kristin Tinker (Kristin) was not given adequate notice and opportunity to be heard on whether the step-down order was appropriate or how such an order should be structured. Further, the trial court failed to defer to the findings and conclusions made by Judge Paul in refusing to grant a similar step-down order that Mark requested a little more than a year before the trial court's ruling in this case, even though the circumstances relevant to that issue had not changed in the interim.

A. Relevant Facts

This is the second time in less than two years that the Tinkers have been before us over issues of spousal support. On October 30, 2003, Mark filed an Order to Show Cause (OSC) for modification of the spousal support provisions of the Tinkers' judgment of dissolution (the "judgment"). Specifically, Mark sought a step-down order that immediately reduced his support obligations from $28,000 per month to $22,000 per month, and that further reduced his obligations in annual steps until they reached zero in November 2010. Mark's declaration made clear that his primary basis for seeking modification was his contention that "Kristin ha[d] totally disregarded the *Gavron*[2] warning" in the Tinkers' stipulated judgment of dissolution, had made no "serious effort to seek employment or to treat her art as anything more than a hobby," and had "absolutely no incentive to do anything to meaningfully contribute to her own support."

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1 Reference to the parties by their first names is just for ease of identification. (See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

2 *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705 (*Gavron*).

In connection with Mark's OSC, Kristin underwent a vocational evaluation in January 2004. The evaluation assessed Kristin's earning capacity with her current skills; the job market for Kristin in Santa Fe, New Mexico, where she lives; and what Kristin "might have been earning if she had retrained following her divorce, rather than continuing to work as a fine artist." The specialist who conducted the evaluation concluded that without retraining, Kristin could earn up to $27,000 per year, but would likely earn $21,000 per year or less. With some retraining, she might earn from to $26,000 to $47,000 per year. Higher paying professional and teaching positions would likely be out of Kristin's reach because of her age (Kristin was then 58), her lack of education beyond high school, and the extensive retraining necessary to qualify for such positions.

On April 6, 2004, Judge Roy L. Paul of the Los Angeles Superior Court, after hearing Mark's OSC, found that Kristin had "not made a reasonable effort to become self-sufficient since the parties' separation." Judge Paul further found that Kristin "is capable of earning an income of $30,000 per year," and he therefore "impute[d] such sum as annual income to" Kristin. Judge Paul found that Kristin's monthly expenses were $26,000.

Judge Paul did not order a step down, as Mark had requested. Instead, Judge Paul reduced Mark's support obligation from $28,000 to $25,000 per month, and ordered support to continue at that level until Kristin's remarriage, the death of either party, or further court order. Although Judge Paul expressed concern at the prospect that Mark "would be facing paying support at [this] level for 20 or 30 years" after a marriage of 10 years and 4 months, he "[found] no evidence at this point . . . to justify any further decrease in support."

This court affirmed Judge Paul's order on May 5, 2005, holding that the trial court had not abused its discretion in weighing the various factors set forth in Family Code

section 4320.[3] (*In re Marriage of Tinker* (May 5, 2005, B175881) 2005 WL 1039749, *4-*5.) While the appeal was pending, the case was transferred from Judge Paul to Commissioner Reva Goetz.

On June 10, 2005—before the remittitur issued on our decision affirming Judge Paul's order—Mark filed another OSC to modify his spousal-support obligations, this time before Commissioner Goetz. Mark, who produces television programming, claimed that his long-term job on the series *NYPD Blue* had ended, as a result of which his monthly income had dropped 64% to $55,926. Mark therefore sought a "decrease [in] spousal support by a corresponding percentage," to "no more than $9000 per month." This is precisely the relief Mark requested in his Form FL-310, Application for Order And Supporting Declaration. Mark did *not* request any further step down in his support obligations, nor did he cite any change of circumstance with respect to Kristin as a basis for his modification request.

Kristin's opposition to Mark's OSC focused solely on whether the change in Mark's income constituted a material change of circumstances warranting a reduction in spousal support. While much of Kristin's declaration concerns Mark's earning capacity and the lifestyle Mark and Kristin enjoyed while married, Kristin also declared that, while she was "endeavoring to build [her] business so that [she could] contribute significantly to [her] living expenses," her business had lost over $30,000 in the preceding 12 months, so that she remained "totally reliant" on Mark "for [her] support."

Seizing on this evidence of Kristin's business losses, Mark filed a 15-page reply memorandum that, *for the first time*, explicitly urged "*two* primary bases for the requested modification" (italics added): (1) that Mark had "lost his job" and had been unable to replace the income, and (2) "the fact that [Kristin] is brazenly and consistently totally disregarding the *Gavron* warning issued to her in this case[.]" Mark's

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3 All statutory references are to the Family Code.

memorandum included a two-page argument that Kristin's "violation" of the *Gavron* warning justified his requested modification, and a three-page argument that Kristin was no longer entitled to be supported at the marital standard of living. Mark also submitted an 11-page "reply declaration" and 147 pages of new exhibits, primarily related to these two issues. Significantly, Mark specifically reiterated that he was "seeking only a support reduction consistent with the reduction he has suffered in his own income."

The trial court heard Mark's OSC on July 25, 2005, a little more than fifteen months after Judge Paul's April 6, 2004 order, and issued its detailed Findings and Orders on August 11, 2005. The trial court found that Mark's income had dropped to $60,659 per month, which represented a 37% reduction since the judgment of dissolution was entered in May 2000. This, the trial court found, constituted "a change in circumstances . . . that would support a downward modification of Spousal Support." The trial court did not specifically find, however, that the decrease in Mark's income affected his ability to pay spousal support. The trial court further found that Kristin had taken on "significant debt, did not pay her income taxes for 2003 and 2004[,]" and her business was losing approximately $2500 per month. Kristin's monthly expenses were $19,336. Further, because the parties had separated in 1998 and Kristin subsequently moved to New Mexico, the trial court concluded that the "marital standard of living . . . is no longer the proper measure of support." The trial court therefore reduced Mark's spousal support obligation to $20,000 per month.

The trial court did not stop there, however. The trial court found that, although Kristin "was put on notice as early as" the entry of judgment in May 2000 that she was expected to "become 'self-supporting' within a reasonable period of time," she had "exhibited a long-term course of conduct that exhibits her failure to take the requirement that she become self-supporting within a reasonable period of time seriously." The trial court thus concluded that "a reasonable period of time, as it pertains to this case, is no more than the length of the marriage." The trial court therefore ordered that, "[e]ffective January 1, 2008 Spousal Support is reduced to zero." While the trial court retained

"jurisdiction over the issue of Spousal Support," it "advise[d] the parties that [it] d[id] not anticipate extending spousal support past the indicated date absent a strong showing that [Kristin] has made every sincere effort to become self-supporting and is unable to do so."

B. Relevant Legal Principles

Section 4330 authorizes the trial court to order spousal support in "an amount, for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances" set forth in section 4320. (§ 4330, subd. (a).) Section 4320 requires the trial court to consider thirteen different factors in fashioning a support order. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.) Among these factors are "[t]he extent to which the earning capacity of each party is sufficient to maintain the marital standard of living," taking into account "[t]he marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment." (§ 4320, subd. (a)(1)). The trial court must also consider the "needs of each party based on the standard of living established during the marriage" (§ 4320, subd. (d)); the "duration of the marriage" (§ 4320, subd. (f)); and "[t]he age and health of the parties." (§ 4320, subd. (h).)

One factor among the many that the trial court must consider is "[t]he goal that the supported party shall be self-supporting within a reasonable period of time." (§ 4320, subd. (*l*).) For marriages of short or medium duration, section 4320(*l*) states that a "'reasonable period of time' . . . generally shall be one-half the length of the marriage," but that statement is not "intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in" section 4320. (§ 4320, subd. (*l*).) An authority characterizes the "one-half the length of the marriage" standard as stating "not a presumption," but "nothing more than a *baseline*

measurement[.]" (Hogoboom and King, California Practice Guide: Family Law (The Rutter Group Rev. #1 2006) ¶ 6:926.3, p. 6-336 (Hogoboom & King), italics in original.) "[T]here is nothing talismanic about the 'one-half of the married life' concept. It is not an eternal verity or an immutable principle carved in legal stone or etched in judicial steel. It fits some cases, it doesn't fit others. In some cases the wife is not entitled to a dime. In other cases she must be supported for life. Each and every case must be judged on its own merits." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 423.)

The "half-the-length of the marriage" standard does not apply to lengthy marriages. Section 4320, subdivision (*l*) expressly exempts "marriages of long duration as described in Section 4336 . . ." from that standard. Section 4336 provides that "there is a presumption . . . that a marriage of 10 years or more, from the date of marriage, to the date of separation, is a marriage of long duration." Accordingly, "a reasonable time-line to reach that goal [of being self-supporting] after a lengthy marriage is *not* measured generally by one-half the length of the marriage [citation]." (Hogoboom & King, ¶ 6:926.4, p. 6-337, italics in original.) "Moreover, there may be cases where (because of age, health, etc.) self-support may not be a realistic expectation at all." (*Ibid.*; see generally, Note, *A Commendable Goal: Public Policy and the Fate of Spousal Support After 1996* (1998) 31 Loyola L.A. L.Rev. 1387 [the Legislature intended courts to use the flexibility inherent in the § 4320 factors to mitigate the potentially "punitive" and "unrealistic" impact of codifying the policy favoring self-support on older women from lengthy marriages].)

C. The Trial Court Erred in Imposing the Step-Down Order

I believe the trial court incorrectly imposed the step-down order. Two considerations lead me to this conclusion.

First, I believe the trial court violated Kristin's right to due process. Mark did not request an order stepping down support either on his Form FL-310, giving notice of the OSC, or in his original declaration in support of the OSC. In his reply memorandum, Mark specifically stated that he was "seeking only a support reduction consistent with the

reduction he has suffered in his own income." Instead, the trial court issued the step-down order sua sponte, without giving Kristin notice that it was considering a step-down order and without giving Kristin an opportunity to be heard on whether such an order was appropriate or how, if issued, the step-down should be structured. This is a basic violation of due process. (U.S. Const., 14th Amend.; Cal. Const., art. l, § 7; see *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 ["Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest"].)

The parties in support proceedings are entitled to procedural due process and a fair hearing. (See *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1326-1327; *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1168-1171.) "Whatever disagreement there may be in our jurisprudence as to the scope of the phrase 'due process of law,' there is no dispute that it minimally contemplates the opportunity to be fully and fairly heard before an impartial decisionmaker." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245.) It is fundamental that a party against whom a judgment is sought be given proper notice and an opportunity to defend. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) Likewise, a motion or OSC must state the nature of the order being sought and the grounds for its issuance. (Cal. Rules of Court, rule 3.110(a).) Generally, a trial court may consider only the relief sought in a notice of motion or the supporting papers. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125.) A family law court "cannot grant unrequested relief against a party who appears without affording that party notice and an opportunity to be heard. [Citations.] Due process requires affording a litigant a reasonable opportunity, by continuance or otherwise, to respond to evidence or argument that is new, surprising, and relevant." (*In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, 574.)

Kristin was not given adequate notice that the trial court might impose a step-down order, on its own volition, by Mark's prayer seeking a reduction in support to "no more than $9000." That prayer seeks a modification in the amount of support payments

based on a material change in circumstance related to the parties' respective needs and ability to pay. That is the issue that both parties in this case briefed; that is the issue they marshaled their evidence to address; and that is the issue the trial court resolved when it reduced Kristin's support from $25,000 per month to $20,000 per month.

The step-down order was additional relief that fundamentally differed from the kind of relief requested by Mark's OSC. The arguments and evidence relevant to the propriety of the step-down order differ from those relevant to a change in the amount of support. Kristin should have been given the opportunity to brief and present evidence regarding (a) whether a step-down order of any kind was appropriate at this juncture, particularly given that Judge Paul had rejected Mark's request for just such an order only fifteen months before; (b) whether the step-down order should have been phased in over time rather than imposed in a single, radical step; and (c) if a phased step-down order was appropriate, over what period of time and in what amounts should the downward steps be imposed. None of these issues was contemplated in the arguments or evidence submitted by either party.

Once the trial court finds a material change in circumstance, it must consider and weigh all of the section 4320 factors in determining whether or how to modify a spousal support order. (*In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 132; *In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 304.) That does not mean, however, that a trial court is free to use the section 4320 factors to fashion any conceivable form of relief without first giving the parties the opportunity to be heard, particularly when such relief was not requested by the party seeking modification. The trial court denied Kristin due process and erred when it imposed the step-down order.

Second, the trial court did not accord sufficient deference to Judge Paul's April 2004 order when it imposed the step-down order. The regrettable fact that some family law matters drag on for years and come before many different judicial officers (see *In re Marriage of Shaffer* (1999) 69 Cal.App.4th 801, 808-09) does not meant that litigants are entitled to file successive petitions to modify support, hoping that a different judge will

hand down a more favorable ruling. Nor does it mean that a trial court's mandatory consideration of the section 4320 factors permits it, in effect, de novo review of the factual findings and legal conclusions made by different judges in prior, recent support orders. "The correctness of [a] trial court's decision in making [an] award for spousal support [is] subject to a direct attack by way of a motion for a new trial . . . and by appeal . . . . [¶] The decree may not be collaterally attacked by way of a petition for modification." (*In re Marriage of Mulhern* (1973) 29 Cal.App.3d 988, 992.)

To the contrary, "[l]itigants 'are entitled to attempt, with some degree of certainty, to reorder their finances and life style [*sic*] in reliance upon the finality of the [support] decree.'" (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 413, quoting *In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 703.) This is why "[m]odification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order." (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982.) "Otherwise, dissolution cases would have no finality and unhappy former spouses could bring repeated actions for modification with no burden of showing a justification to change the order." (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.) "[I]f the circumstances in question existed at the time of the previous order those circumstances presumably were considered when the previous order was made and bringing them to the court's attention . . . later does not constitute a 'change' in the circumstances. *Nor has there been a change in circumstances merely because a different trial judge disagrees with the previous order.*" (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47, italics added.)

In his OSC before Judge Paul, Mark specifically prayed for a step-down order reducing his support obligations to zero in November 2010. Judge Paul denied him that relief. In doing so, Judge Paul made a finding that "[Kristin] has not made a reasonable effort to become self-supporting since the parties' separation." Judge Paul determined that the appropriate remedy for Kristin's failure in that regard was to impute to Kristin $30,000 per year in income, based on the results of a vocational examination that

concluded that Kristin's earning capacity, without retraining, was less than $27,000 per year. Judge Paul thus fixed Mark's support obligation at a level that assumed that Kristin was fully employed and earning at her capacity. There is no evidence that Kristin's earning capacity materially changed in the fourteen months between Judge Paul's April 2004 order and Mark's June 2005 OSC, nor is there any evidence that Kristin's earning capacity will materially change prior to January 1, 2008. (See *In re Marriage of Prietsch and Calhoun* (1987) 190 Cal.App.3d 645, 665-666 [order stepping down and then terminating support inappropriate when "the supported spouse does not possess the capacity to become self-sufficient"]; cf. *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1247 [affirming order stepping down and then terminating support when based on substantial evidence that supported spouse "could become, and should become, sufficiently self-supporting within the dates the court set for the reduction and termination of spousal support"].) As a result, there was no evidentiary basis to justify the trial court's disregard of Judge Paul's April 2004 decision denying Mark a step-down order.

It is true that "the public policy of this state has progressed from one which 'entitled some women to lifelong alimony as a condition of the marital contract of support to one that entitles either spouse to postdissolution support for only so long as is necessary to become self-supporting.'" (*In re Marriage of Schmir, supra,* 134 Cal.App.4th at p. 54.) And Judge Paul did warn Kristin about her responsibilities in that regard. The trial court in this case can fashion an appropriate order to further that public policy, or to effectuate the intent of Kristin and Mark as expressed in the *Gavron* admonition incorporated into their stipulated judgment of dissolution. The step-down order that the trial court imposed in this case, however, was not an appropriate order. The record establishes that Kristin is capable of earning $30,000 per *year*, and that income has already been imputed to her in calculating Mark's spousal support obligation. The trial court found that Kristin's needs are nearly $20,000 per *month*, and that figure already reflects the trial court's conclusion that "the marital standard of living . . . is no

longer the proper measure of support." There is no evidence that Kristin can do anything to bridge the chasm between her earning capacity and her demonstrated need prior to January 1, 2008. The trial court incorrectly exalted the policy favoring self-support over not only the other factors set forth in section 4320, but also Kristin's fundamental right to a fair and adequate opportunity to be heard, and the equally important policy concerns of finality, predictability and consistency in adjudicating the parties' disputes.

Accordingly, I would reverse the trial court's order to the extent it provides for a reduction of spousal support to zero as of January 1, 2008. In all other respects, I would affirm.

MOSK, J.